NO. 48746-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MIKHEAL BOSWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Melissa Hemstreet, Judge

MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

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I. IDENTITY OF MOVING PARTY

CATHERINE E. GLINSKI, appointed counsel for appellant, MIKHEAL BOSWELL, requests the relief designated in part II of this motion.

II. STATEMENT OF RELIEF REQUESTED

Appointed counsel requests permission to withdraw pursuant to RAP 15.2(i).

III. FACTS RELEVANT TO MOTION

By order dated April 27, 2016, and pursuant to an order of indigency entered in superior court, this Court appointed Catherine E. Glinski to represent appellant Boswell in his appeal from his conviction in Kitsap County Superior Court of rape in the second degree.

In reviewing this case for issues to raise on appeal, counsel did the following:

(a) read and reviewed the verbatim report of proceedings from the pretrial motion hearings, jury trial, and sentencing hearing;

(b) read and reviewed all of the clerk's papers;

(c) researched all pertinent legal issues and conferred with other attorneys concerning potential legal and factual bases for appellate review.

IV. GROUNDS FOR RELIEF

RAP 15.2(i) allows an attorney to withdraw on appeal where counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967); State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970); and State v. Pollard, 66 Wn. App. 779, 825 P.2d 336, 834 P.2d 51, rev. denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Boswell to proceed pro se. Counsel submits the following brief to satisfy her obligations under Anders, Theobald, Pollard, RAP 15.2(i), and RAP 18.3(a)(2).

V. BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW

A. Potential Issues on Appeal

1. Was there sufficient evidence to sustain a conviction?

2. Did the court violate Boswell's constitutional right to present a defense by improperly excluding relevant evidence?

3. Did admission of improper opinion evidence violate Boswell's right to a jury trial?

4. Did the court err in refusing to give WPIC 6.41?

5. Did the court err in failing to instruct the jury that the State had the burden of proving lack of consent?

B. Statement of the Case

1. Procedural History

The Kitsap County Prosecutor charged Appellant Mikheal Boswell by amended information with one count of second degree rape, alleging that he engaged in sexual intercourse with LE while she was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 14-16; RCW 9A.44.050(1)(b). The case proceeded to jury trial before the Honorable Melissa Hemstreet, and the jury returned a guilty verdict. CP 80. The court imposed a standard range sentence of 95 months to life imprisonment. CP 85. It also determined that Boswell had the likely future ability to pay legal financial obligations and imposed $1500 in LFOs. CP 89.

2. Substantive Facts

Evidence at trial established that Boswell, who was in the Marines, spent the evening of June 6, 2015, with co-workers Cristian Orozco and LE's husband, as well as LE. 2RP 115; 3RP 155; 4RP 367-67. LE had not met Boswell before that night. 3RP 156. Boswell, LE's husband, and LE were drinking, and Orozco was the designated driver. 2RP 112; 3RP 139-41, 156; 4RP 368. The group ended up at Boswell's apartment,

where LE's husband passed out on a couch and LE went to the bathroom to vomit. 2RP 113; 3RP 159; 4RP 371, 421-22. About 20 minutes later Orozco and Boswell tried to get LE to move to the couch with her husband, but she remained asleep on the bathroom floor. 4RP 371-74, 422.

After Orozco left, Boswell went into the bathroom to check on LE. 4RP 424. The two had sexual intercourse. LE testified that she remembered waking up and realizing Boswell was having sex with her. 3RP 161. It was not something she wanted, but she was unable to move. She passed out, and when she woke again Boswell was repositioning her. 3RP 163. LE testified that she was frozen and unable to respond throughout the encounter. 3RP 171. She testified to acts of vaginal, oral, and anal intercourse, although the sequence of events she described was inconsistent with previous statements she had made. 3RP 164, 179, 225.

Boswell testified that the sexual encounter was consensual. 4RP 432-33. He had previously denied any sexual intercourse with LE, and at trial he explained that it would be a violation of the Marine code of honor to have sex with another Marine's wife, and he was trying to avoid repercussions from breaking that code. 4RP 357, 414, 442-43. He testified he had no reason to believe LE was unaware of what was

happening or that she objected to or did not consent to the intercourse. 4RP 426, 327, 431-33, 444.

C. Potential Arguments on Appeal

1. Did the State present sufficient evidence to establish every element of the charged offense?

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Boswell was charged with second degree rape, under RCW 9A.44.050(1)(b). Under that statute, the State was required to prove that Boswell engaged in sexual intercourse with LE while she was unable to consent by reason of being physically helpless or mentally incapacitated. These conditions are defined as follows:

> (4) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.
> (5) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

RCW 9A.44.010. Boswell may wish to argue that the State failed to prove the elements of the offense and his conviction must be reversed.

2. Did the court violate Boswell's constitutional right to present a defense by improperly excluding relevant evidence?

Prior to trial the defense moved to admit the results of portable breath tests given to Boswell and LE shortly after the incident. Counsel argued that the results, showing Boswell had a blood alcohol content of .16 would show Boswell had consumed a fair amount of alcohol and would cast doubt on the investigating officer's testimony that Boswell showed no obvious signs of intoxication. 2RP 56. Counsel further argued that the BAC level was relevant because the jury would hear statements Boswell made while he was at that level. 2RP 68-69. LE's BAC level was also relevant to the jury's evaluation of her testimony. 2RP 70. The court ruled that the PBT results are valid only if the appropriate protocol was used by a trained officer with a certified device, and there had been no evidence of that. 2RP 73. It ruled that the parties could present evidence

that a PBT was done and showed the consumption of alcohol, but the BAC level would not be admissible. 2RP 73.

The investigating officer testified at trial that Boswell was very alert and did not appear to be under the influence. He gave Boswell a test that showed his level of alcohol, which surprised the officer, who did not see any obvious signs of intoxication. 3RP 209.

Both the state and federal constitutions guarantee a criminal defendant the right to present evidence in his own defense. U.S. Const. Amend. VI, XIV; Const. art. I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury, so that the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest in doing so. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Although a trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See State v. Crowder, 103

Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024 (2001).

Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more or less probable than it would be without the evidence. ER 401. Only minimal logical relevancy is required for evidence to be admissible. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) (quoting 5 K. Tegland, Wash. Prac. § 83, at 170 (2d ed. 1982)), affirmed, State v. Bebb, 108 Wn.2d 515, 740 P.2d 829 (1987).

Boswell may wish to argue, as he did below, that the PBT results were relevant to the jury's determination of credibility and voluntariness. He may also wish to argue that the court's exclusion of this relevant evidence violated his constitutional right to present a defense.

3. Did admission of improper opinion evidence violate Boswell's constitutional right to a jury trial?

The defense moved to exclude testimony from the State's expert regarding three automatic responses to traumatic events: fight, flight or freeze. 2RP 76-77, 80. Counsel argued that the testimony would not be helpful to the jury because it was within common understanding. 2RP 76-77; CP 23-27. The court ruled that the proposed testimony was outside the scope of understanding of an ordinary layperson and would be allowed. It

ruled, however, that the expert would not be allowed to invade the province of the jury. She would not be permitted to testify about interviewing LE or to provide any sort of victim profile. 2RP 85.

The State's expert testified that natural reactions to trauma are fight, flight, or freeze. These reactions are automatic, not the product of a decision. 3RP 266-69. The State relied on this testimony in closing, arguing that LE's inability to move or scream upon waking up was a common response to trauma. 5RP 513.

Under the Washington constitution, the role of the jury must be held "inviolate." Wash. Const. art. I, §§ 21, 22; State v. Montgomery, 163 Wn.2d 577, 590, 813 P.3d 267 (2008). The jury's fact-finding role is essential to the constitutional right to trial by jury. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Therefore, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (expert witness's opinion that complaining witness in third degree rape case had "rape trauma syndrome" inadmissible because it communicated witness's opinion that witness was telling the truth).

An expert may express an opinion concerning his or her field of expertise if the opinion will aid the jury. ER 702; Montgomery, 163

Wn.2d at 590. The opinion may encompass an ultimate fact, but the expert may not express an opinion as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. Montgomery, 163 Wn.2d at 591. A witness offering an opinion under ER 702 must be qualified as an expert, and any opinion testimony must be based on a theory generally accepted in the scientific community. State v. Jones, 71 Wn. App. 798, 814, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

Boswell may wish to argue, as he did below, that the expert's testimony constituted an opinion on LE's veracity and, by implication, Boswell's guilt. The evidence was therefore improper opinion which invaded the province of the jury and denied Boswell his right to a jury trial.

4. Did the court err in refusing to give WPIC 6.41?

After the evidence was presented, defense counsel requested that the court give WPIC 6.41 ("You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances."). CP 57. Counsel argued that the instruction was appropriate because out-of-court statements of Boswell had been admitted, and the jury would weigh the

credibility of those statements. 4RP 473. The fact that the officer was surprised at Boswell's PBT results, due to the higher than expected level of intoxication, cast doubt on the voluntariness of Boswell's statements, and therefore the instruction was appropriate. 4RP 475. The court declined to give the instruction, determining that the opening instruction sufficiently apprised the jury regarding weight and credibility. 4RP 475; CP 66 ("You are the sole judges of credibility. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know…").

The purpose of jury instructions is to "furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict." State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). Jurors should not have to speculate about what the law is. State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707 (1995).

Boswell may wish to argue, as he did below, that WPIC 6.41 would have guided the jury in its evaluation of his out-of-court statements, and it was error for the court to refuse the instruction.

5. Did the court err in failing to instruct the jury that the State had the burden of proving lack of consent?

Defense counsel proposed an instruction that placed the burden of proving lack of consent on the State. CP 59. Counsel acknowledged that the instruction was not supported by statute or case law and suggested the issue should be resolved by the Court of Appeals. 5RP 484. The court declined to give the instruction. 5RP 484-85.

It is a defense to the charge of second degree rape based on mental incapacity or physical helplessness that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless. RCW 9A.44.030(1). The statute provides that the defendant must prove this defense by a preponderance of the evidence. Id.

In State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014), the Supreme Court held that, when the charge is rape by forcible compulsion, requiring the defense to prove consent violates due process. The court held that "when a defense necessarily negates an element of an offense, it is not a true affirmative defense, and the legislature may not allocate to the defendant the burden of proving the defense." W.R., 181 Wn.2d at 762. Due process is not violated when the defendant is burdened with proving an affirmative defense that merely excuses otherwise criminal conduct, however. Id. "The key to whether a defense necessarily negates an

element is whether the completed crime and the defense can coexist." Id. at 765.

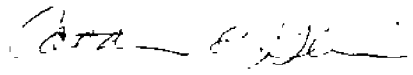
Boswell may wish to argue that requiring him to prove the defense in this case violates due process.

VI. CONCLUSION

For the reasons stated above, counsel for appellant asks that the motion to withdraw as appointed counsel be granted, and that appellant be allowed to proceed pro se should he choose to do so.

DATED this 17th day of October, 2016.

Respectfully submitted,



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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibits in *State v. Mikheal Boswell*, Cause No. 48746-2-II as follows:

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Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Port Orchard, WA
October 17, 2016

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